UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT EUGENE BURROW,

Petitioner,

v.

STEVE SINCLAIR,

Respondent.

Case No. 10-cv-1241-JLR-JPD

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Robert E. Burrow, a state inmate proceeding *pro se*, has filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus, which challenges his 2007 jury convictions in King County Superior Court on two counts of attempted murder in the first degree, one count of attempted murder in the second degree, two counts of burglary in the first degree, and one count of violating a domestic violence restraining order, with deadly weapon enhancements. Dkt. 1; Dkt. 12, Ex. 1. Respondent has filed an answer opposing the petition, Dkt. 10, to which petitioner has replied, Dkt. 13. After careful consideration of the petition, the briefs, all governing authorities and the balance of the record, the Court recommends that the petition be DENIED and this case DISMISSED with prejudice.

II. FACTS AND PROCEDURAL HISTORY

A. Factual Background

The Washington State Court of Appeals summarized the relevant facts of this case as follows:

> Joni Butz worked for Jeff Hulsey at his truck dealership for over 16 years, beginning in 1989. Although Butz and Hulsey had a romantic relationship early on, when their romance ended, they remained close friends and Butz continued to work for Hulsey. Butz dated Robert Burrow for nine years. Their relationship ended in August 2004 after incidents in a criminal charge against Burrow prompted Butz to obtain a protection order. Early in 2005, Butz began dating Steve Benson, a salesman at Hulsey's dealership.
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> In the early morning hours of April 9, 2005, Burrow appeared at Hulsey's home in Snohomish County and fought with Hulsey. Shortly thereafter, Burrow went to Butz's home in King County and confronted Butz and Benson. Based on the events of that morning, the State charged Burrow with three counts of attempted murder in the first degree, two counts of first degree burglary, and a felony violation of a court order, each with a deadly weapon enhancement.
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> At trial, Hulsey testified that after working until 4 a.m., he was preparing to go to bed when he heard strange noises. He found Burrow bleeding from a leg wound that apparently occurred when Burrow was kicking his way through the locked French doors. Hulsey gave Burrow a hand towel and tape to stop the bleeding. Burrow then demanded to see Butz and searched the house for her. When Hulsey encouraged Burrow to leave, Burrow attacked Hulsey with a knife. After receiving several stab wounds to the shoulder, arms and neck, Hulsey escaped, got his gun, shot Burrow, called 911, and ran out of the house.
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> Butz and Benson testified that they awoke to hear Burrow breaking into Butz's condominium. While Butz was calling 911, Benson watched Burrow reach in through the broken window and unlock the door. According to Benson, Burrow came directly to him and stabbed him in the chest. Benson hit Burrow with a metal baton and hurried out of the room, attempting to draw Burrow away from Butz. Before waking up on the dining room floor, Benson remembered Burrow following him. Benson

> returned to the bedroom to find Burrow holding a knife to Butz's neck. Benson tackled Burrow and held him until the police arrived.
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> Burrow testified in his defense that he went to Hulsey's house to demand the money that Hulsey owed him from a boat purchase that had been the subject of an insurance fraud perpetrated by Hulsey and Butz. According to Burrow, when he threatened to call the police to report Hulsey's scam, Hulsey attacked him with a knife and shot him. He left to go to the hospital, became confused, and eventually drove to Butz's home, intending to ask for help. He claimed to be unable to recall much of the events that occurred after he arrived, other than accidently breaking and then squeezing through a window.
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> Police and medical personnel testified that after his arrest, Burrow was in and out of consciousness. At Harborview Medical Center, doctors noted Burrow's extremely low blood pressure and that medics had treated him by inserting a breathing tube, but his wounds were not severe. Burrow's toxicology screen was positive for amphetamines, methamphetamine, evidence of marijuana, and evidence of some anti-anxiety medication, but medical personnel did not perform tests to determine the amounts of these substances.
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> The jury found Burrow guilty of the lesser included charge of attempted murder in the second degree as to Hulsey, two counts of attempted murder in the first degree as to Butz and Benson as charged, two counts of first degree burglary, and felony violation of a protection order, each with a deadly weapon enhancement. The trial court imposed a standard range sentence.
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> Following trial, a juror told the prosecutor that she brought a measuring tape into the jury room and that the jurors used it to measure the blade of the broken knife found at Hulsey's home. The prosecutor and the juror signed affidavits as to these facts.

Dkt. 12, Ex. 4 at 1-2.

B. Direct Review

Petitioner appealed his convictions through counsel to the Washington State Court of Appeals. Dkt. 12, Ex. 2. On August 3, 2009, in an unpublished opinion, the Court of Appeals affirmed petitioner's convictions. *Id.*, Ex. 4. The Court of Appeals issued its mandate

terminating review of petitioner's appeal on September 24, 2009. *Id.*, Ex. 5. Neither petitioner nor his counsel filed a motion for discretionary review of the Court of Appeals' decision to the Washington State Supreme Court. *See* Dkt. 1 at 3; Dkt. 10 at 4. Petitioner has never filed a personal restraint petition ("PRP") seeking collateral review of his convictions in the state courts. *See* Dkt. 1 at 10-12.

C. Federal Collateral Review

On August 2, 2010, petitioner filed the instant 28 U.S.C. § 2254 petition for writ of habeas corpus. Dkt. 1. Petitioner is currently incarcerated at the Washington State Penitentiary in Walla Walla, Washington.

III. ISSUES PRESENTED

Petitioner's habeas corpus petition raises the following three grounds for relief:

1. Ineffective assistance by appointed counsel – violation of 6th Amendment.

2. Trial Court erred when it denied funds for expert witness – violating right to due process and fair trial.

3. Juror Misconduct – extrinsic evidence allowed to affect Jury's deliberations and determinations.

Dkt. 1 at 6-10; *see also* Dkt. 13 at 1.

IV. DISCUSSION

A. Petitioner's Claims Were Not Properly Exhausted in State Court.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), governs petitions for habeas corpus filed by prisoners convicted in state courts. *See* 28 U.S.C. § 2254. Before a federal district court can review the merits of a § 2254 petition, a petitioner must first exhaust state court remedies. 28 U.S.C. § 2254(b)(1)(A); *Fields v. Waddington*, 401 F.3d 1018, 1020 (9th Cir. 2005). The purpose of the exhaustion doctrine is to preserve federal-state comity which, in this setting, provides state courts an initial opportunity to correct violations of a prisoner's federal rights. *Picard v.*

Connor, 404 U.S. 270, 275 (1971); *Ex parte Royall*, 117 U.S. 241, 251-52 (1886). A petitioner can satisfy the exhaustion requirement by either (1) fairly and fully presenting each federal claim to the highest state court from which a decision can be rendered, or (2) demonstrating that no state remedies are available. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). A petitioner fairly and fully presents a claim if it is submitted "(1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (internal citations omitted). A state prisoner must "give the state courts one full opportunity to resolve any constitutional issues by invoking *one complete round* of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (emphasis added); *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004) ("[T]o exhaust a habeas claim, a petitioner must properly raise it *on every level* of direct review.") (emphasis added). The Ninth Circuit also requires that a habeas petitioner explicitly identify the federal basis of his claims either by identifying specific portions of the federal Constitution or statutes, or by citing federal or state case law that analyzes the federal Constitution. *Insyxiengmay*, 403 F.3d at 668. Alluding to broad constitutional principles, without more, does not satisfy the exhaustion requirement. *Id*.

Here, petitioner originally raised the three grounds set forth in his habeas petition on direct appeal to the Court of Appeals. *See* Dkt. 12, Ex. 3 at 1-2. However, these federal claims have never been presented to the Washington Supreme Court. Accordingly, the grounds set forth in petitioner's habeas petition were not properly exhausted in state court.

B. Federal Review of Petitioner's Claims Is Precluded Because the Grounds Are Procedurally Defaulted.

The procedural default doctrine is a separate and distinct defense from the exhaustion requirement that bars federal habeas review. *See Trest v. Cain*, 522 U.S. 87, 89 (1997) ("procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserve'"); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 850 (1999) (Stevens, J. dissenting)

(discussing the difference between the exhaustion doctrine and procedural default doctrine). Although different and distinct doctrines, the procedural default doctrine and the exhaustion doctrine intertwine when habeas claims, as here, have not been properly exhausted in state court. A procedural default resulting in technical exhaustion of a claim is considered improper exhaustion. *See Harmon v. Ryan*, 959 F.2d 1457, 1461 (9th Cir. 1992) (finding that claims exhausted due to procedural default were "not properly exhausted").

A procedural default in state court generally leads to a preclusion of federal habeas review if the last state court rendering a judgment in the case rests its judgment on the procedural default. *See Harris v. Reed*, 489 U.S. 255, 263 (1989); *see also Franklin v. Johnson*, 290 F.3d 1223, 1230-31 (9th Cir. 2002). However, if the petitioner has not presented his federal claims to the state courts, the state courts do not need to expressly rely upon procedural default as a predicate to a federal court's determination that federal review is barred due to procedural default. *Harris*, 489 U.S. at 263 n.9. In that case, the "federal courts may properly determine whether the claim has been procedurally defaulted under state law. . . ." *Id.* at 269 (O'Connor, J., concurring).

Here, the Court finds that petitioner's claims for federal habeas relief were procedurally defaulted in state court. Specifically, petitioner had thirty days from August 3, 2009, the date that the Court of Appeals issued its decision denying petitioner's direct appeal, to file a motion for discretionary review to the Washington Supreme Court. *See* Wash. R. App. P. 13.5(a). However, petitioner failed to do so. *See* Dkt. 12, Ex. 4. As a result, if petitioner were to present these claims in a motion for discretionary review, the motion would be denied. Similarly, petitioner is barred from presenting his claims in a PRP to the Washington courts, because petitioner failed to file a PRP within one year after the Court of Appeals' mandate on September 25, 2009. *See* R.C.W. § 10.73.090(1) ("No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final. . . ."); Dkt. 12, Ex. 5.

Before federal review is precluded due to a procedural default, however, the state procedural rule must be an "independent and adequate state ground." *See Hanson v. Mahoney*, 433 F.3d 1107, 1113 (9th Cir. 2006). "In order for the procedural default doctrine to apply, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Id.* A procedural default is not "independent" if the state procedural bar depends upon a determination of federal law, and it is not "adequate" if the state courts bypass the procedural rule. *See Harmon*, 959 F.2d at 1461. Where a state court decision denying relief would be based on an independent and adequate state law ground, even a procedural one, a habeas petitioner is procedurally defaulted from bringing his claims to the federal courts. *Casey v. Moore*, 386 F.3d 896, 920 (9th Cir. 2004). This is because if state prisoners were allowed to meet the federal habeas exhaustion requirement by procedurally defaulting their claims in state courts, "the comity interests that animate the exhaustion rule could easily be thwarted." *O'Sullivan*, 526 U.S. at 854.

Turning to the instant case, petitioner has not made any showing that R.C.W. § 10.73.90 or Washington Rule of Appellate Procedure 13.5(a) are not independent and adequate state law grounds. Accordingly, federal habeas review of petitioner's claims is precluded because of petitioner's procedural default of these claims in state court.

C. Petitioner Fails to Show Cause and Prejudice or a Miscarriage of Justice.

If a federal habeas petitioner can show cause for the procedural default in state court and actual prejudice, federal review of habeas claims is permitted despite the procedural default in state court. *See Noltie v. Peterson*, 9 F.3d 802, 804-05 (9th Cir. 1993). To demonstrate cause, a habeas petitioner must show that the procedural default was due to "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). If the petitioner had no constitutional right to counsel in the proceeding in which the default occurred, however, attorney error cannot constitute cause to excuse the procedural default. *See Coleman v.*

Thompson, 501 U.S. 722, 752-54 (1991); *Manning v. Foster*, 224 F.3d 1129, 1133 (9th Cir. 2000); *Poland v. Stewart*, 169 F.3d 573, 588 (9th Cir. 1999). In order to show prejudice, a petitioner bears the burden of showing not merely that an error created a possibility of prejudice, but that the error worked to petitioner's actual and substantial disadvantage, infecting the entire trial with constitutional error. *Carrier*, 477 U.S. at 494. *See also Manning*, 224 F.3d at 1135-36 (holding that "prejudice is presumed when an attorney fails to file an appeal against the petitioner's express wishes," and remanding for further findings as to the cause requirement). An additional exception to the procedural default rule, not at issue here, applies where a habeas petitioner can demonstrate a sufficient probability that a federal court's failure to review his federal claim will result in a fundamental miscarriage of justice. *See Cook v. Schriro*, 538 F.3d 1000, 1028 (9th Cir. 2008).

Petitioner alleges that ineffective assistance of counsel directly resulted in his failure to exhaust in the state courts. Specifically, plaintiff avers that he failed to exhaust his claims on direct appeal because his attorney "did not file [an] appeal to Supreme Court, abandoned my case without notice and allowed me to believe this had been done." Dkt. 1 at 12; *see also id.* at 6, 8, 9. Petitioner does not allege, however, that his appellate counsel disregarded petitioner's express request to file a motion for discretionary review or a PRP with the Washington Supreme Court. *See Manning*, 224 F.3d at 1135-36. Rather, petitioner concedes that he simply "assumed (however wrong) that any and all necessary requirements were being addressed properly by his attorney of record." Dkt. 13 at 9.

Without more, petitioner has not demonstrated ineffective assistance of counsel. Specifically, as petitioner had no right to counsel on discretionary review or in a collateral challenge, he likewise had no right to effective assistance of counsel at those stages of the proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (providing that "a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction," and similarly has no "constitutional right to counsel when

mounting collateral attacks upon [his or her] convictions[.]"). *See also Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974). As a result, petitioner's assertion that his appellate counsel neglected to file a motion for discretionary review to the Supreme Court does not establish cause to excuse petitioner's procedural default. Nor does petitioner provide any evidence to establish prejudice or that the failure to consider his claims will result in a fundamental miscarriage of justice. Accordingly, petitioner's federal habeas claims remain unexhausted and procedurally barred.

D. Certificate of Appealability

A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a certificate of appealability from a district or circuit judge. A certificate of appealability may issue only where a petitioner has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that petitioner is not entitled to a certificate of appealability with respect to his claims.

V. CONCLUSION

For the foregoing reasons, this Court recommends that the petition be DENIED and this case DISMISSED with prejudice. A proposed Order accompanies this Report and Recommendation.

DATED this 5th day of January, 2011.

James P. Donohue

JAMES P. DONOHUE
United States Magistrate Judge